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255528—53

# In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 737

HERBERT E. TOOR AND FLORENCE D. TOOR,
PETITIONERS

*v.*

HARRY C. WESTOVER

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court (R. 57–63) is reported at 94 F. Supp. 860. The opinion of the Court of Appeals (R. 520–530) is reported at 200 F. 2d 713.

### JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1952. (R. 531.) The taxpayers' petition for rehearing, filed on January 19, 1953, was denied on January 28, 1953. (R. 532.) The petition for a writ of certiorari was filed on April 22, 1953. The jurisdiction of

this Court is invoked under 28 U. S. C., Section 1254.

### QUESTION PRESENTED

Whether the court below correctly affirmed the District Court's determination that the taxpayers and the bank, as trustee for their two minor children, did not intend in good faith to carry on the taxpayers' business as bona fide partners during the taxable years 1943 through 1945, and, therefore, that the share of the business income attributed to the bank as a partner was includible in the taxpayers' gross income for those years.

### STATUTE INVOLVED

These are printed in the Appendix, *infra*, pp. 10–11.

### STATEMENT

In two suits for recovery of additional amounts assessed against them as income taxes for the years 1943, 1944, and 1945, petitioners contended that the Commissioner had erred in determining that a family partnership arrangement for the benefit of their two minor children was invalid for tax purposes.[1] The pertinent facts were found by the District Court as follows (R. 70–73):

[1] The two suits presented identical issues, and the court below, acting on a stipulation of the parties, ordered that both should be determined by the decision in *Herbert E. Toor* v. *Westover*, No. 10461–Y in the District Court. (R. 515–516.) Since the wife is a party only because of her community property interest, the term "taxpayer" will be used here for convenience to refer to the husband unless otherwise specified.

On November 20, 1942, the taxpayer, as manager of his marital community's property, entered into two trust agreements with the Beverly Hills National Bank and Trust Company, as trustee (hereinafter called the bank or trustee), to create trusts for his two minor children.[2] At the same time, the taxpayer and the trustee executed articles of limited partnership for the sharing of the profits of a furniture manufacturing business theretofore operated by the taxpayer under the name of the Furniture Guild of California. The trust and limited partnership agreements were presented to the bank by the taxpayer as one package. (R. 70.)

Each trust was in the sum of $10,500. The trustee was authorized to invest the trust funds only in businesses in which the taxpayer was a partner or principal stockholder, or in Government bonds. In each trust deed the taxpayer reserved the power to remove the trustee and put another in its place, without limitation. (R. 70.) The trust instruments contained no statement that they were not revocable by the grantors. It was not until January 13, 1944, that there were executed amendments to the trust instruments which stated that they were not so revocable. (R. 70–71.)

[2] The record shows that the taxpayer's wife was co-signer with him in the original trust agreements (R. 117–127), as well as in the subsequent amendments thereto. (R. 176–180, 358–361, 522.)

Under the articles of limited partnership, the taxpayer was declared to be a general partner, and the bank as trustee was declared to be a limited partner. The partnership was not to terminate until 1955, and the interest of the limited partner was not to be transferable. The taxpayer, however, had the right to terminate the arrangement upon giving a thirty-day notice of intention to dissolve it, and he had the absolute right to purchase the interest of the limited partner at "book" value. The taxpayer, under the partnership agreement, retained full charge and control of the entire business, and had full power and authority to do any act necessary or convenient with respect to the business. While under the agreement the business profits were to be divided on the books in the ratio of one-sixth to each trust and four-sixths to the taxpayer, he had the right to distribute the profits at such times and in such amounts as he determined. (R. 71.)

The trustee contributed neither independent money nor services during the existence of the partnership. (R. 71.) The control of the business income and the manner of its allocation, the salaries to be received by the taxpayer and the employees, the amount to be paid for the rental of the taxpayer's property on which the business was carried on—in brief, the determination of all matters requiring judgment of management, control of the property, the disposition and alloca-

tion of funds derived from the business, including amounts to be allocated each year, were so exclusively under the domination of the taxpayer that, to all intents and purposes, the creation of the partnership made no change whatever in the manner in which the business had been conducted before. (R. 72.)

No instance appears where the bank or its representatives used independent judgment or suggested any action other than that proposed by the taxpayer. The trustee exercised none of the rights of partnership even by way of advice. The trustee did not exercise dominion and control over the trust corpus in the business and did not influence the conduct of the partnership or the disposition of its income. (R. 72.)

The nature of the business was such that the taxpayer's personal services, business judgments and skill played an important role in the earning of the business income. But to the extent that capital played a part, because of his control over the corpus and income and his retention of so many of the attributes of ownership of the trust corpus in his business, the taxpayer must still be considered to have created the entire business income. (R. 72.)

The entire effect of the establishment of the partnership was merely to permit the taxpayer's children to receive a certain amount of the income when he determined that the income was

subject to distribution rather than diversion to other business determined by him. (R. 72–73.)

The taxpayer and the trustee did not act with a business purpose in setting up the limited partnership. The taxpayer and the trustee did not in good faith intend to join together in the present conduct of the business enterprise. (R. 73.)

Upon the basis of these facts, the District Court held that the parties were not bona fide partners for income tax purposes during the taxable years involved, and therefore the entire income of the business was properly assessed by the Commissioner of Internal Revenue against the taxpayer and his wife on a community property basis. The Court of Appeals affirmed.

## ARGUMENT

This case presents no question requiring further review by this Court. Far from creating any conflict of decisions, the decision below is simply a correct application of the settled principle that an anticipatory assignment of income, whatever its formal cloak, is ineffective as a means of shifting tax liability. *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579; *Commissioner* v. *Tower,* 327 U. S. 280; *Lusthaus* v. *Commissioner,* 327 U. S. 293; *Commissioner* v. *Sunnen,* 333 U. S. 591; *Commissioner* v. *Culbertson,* 337 U. S. 733.

The taxpayer's contention that the bank, as trustee for his two minor children, was a bona fide limited partner in his business is premised upon the purported purchase by the bank of a partnership interest with funds transferred to the bank by the taxpayer and his wife.[3] But it has never been suggested that these mere forms of gift and purchase are sufficient in themselves to constitute a partnership for tax purposes. And both courts below, fully supported by the record, have found that the taxpayer—because of the control he retained over the trust corpus and income, remaining for all practical purposes the real owner of the partnership business and creator of its income—was properly taxed on the entire partnership income.

The District Court, in findings which are not attacked here, found (R. 70–73) that the taxpayer, sole proprietor of the business, presented the trust and limited-partnership agreements to the bank in 1942 as a single package; the bank, as trustee, was required to enter into the partnership as a condition for creation of the trust. Once in the partnership, the bank could neither terminate nor transfer its interest. The partnership was not to terminate until 1955, but the taxpayer reserved the power to terminate the arrangement at any time upon giving thirty days' notice or by

[3] There is no contention that the trustee—or the minor children who were beneficiaries of the trust—contributed any services to the partnership. (R. 72.)

purchasing the interest of the trustee at its book value. The taxpayer retained all powers of management and control over the property and determined the disposition and allocation of funds derived from the business. The parties, in short, "did not act with a business purpose in setting up the limited partnership." (R. 73.)

On these unquestioned findings, we submit, the court below was clearly correct in concluding (R. 529) that the taxpayer "remained the substantial owner of the interest he purported to have given away." Conceding that even a limited partnership involving a family relationship may be valid for tax purposes, and recognizing the restricted role of a limited partner, the court below disapproved the District Court's view that "the creation of the limited partnership made *no change whatsoever* in the manner in which the business had been conducted before." (R. 524–525; emphasis added.) But this modification in emphasis leaves intact the dispositive conclusion, on which both courts agreed, that the taxpayer never conferred upon the bank the kind of substantial ownership required to justify shifting to the bank as a "partner" a portion of his income tax liability.

Nor is there any merit in the contention (Pet. 6, 7–9) that this single subsidiary point of divergence between the courts below somehow creates a question warranting review by this Court. Sharing the view that the taxpayer had not as a

matter of fact created a genuine partnership, the court below merely disagreed with the district court's more sweeping conclusion that there had been "no change whatsoever" in the taxpayer's method of conducting his business. The Court of Appeals made no new findings of fact; on the contrary it approved, following examination of the record, the District Court findings it held to be "crucial" (R. 529). Whatever shades of difference there may have been in the lines of reasoning followed by the courts below, there is clearly no basis for the suggestion, built by petitioners upon wholly irrelevant precedents, that the court below was required to reverse the decisive findings and conclusion with which it agreed.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1953.

## APPENDIX

Internal Revenue Code:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *.

(26 U. S. C. 1946 ed., Sec. 11.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

(26 U. S. C. 1946 ed., Sec. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

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